

Four Key Takeaways from FTC's Lead Generation Workshop

McGlinchey Consumer Finance Alert

November 9, 2015

On Friday, October 30, the Federal Trade Commission (the "FTC") held "Follow the Lead: An FTC Workshop on Lead Generation" in Washington, DC, in which five panels of industry experts, consumer advocates, and government regulators discussed issues pertaining to online lead generation in various industries, aiming to provide the FTC with guidance on the workings of the lead generation industry and the legal issues it faces.

The workshop focused generally on lead generation issues in industries across the board, and the potential harms that the practice itself poses to consumers. Of particular concern to the panelists were two industries that engaged in the practice of: (1) lending (particularly small-dollar installment lending) and (2) education (particularly for-profit institutions). The use of lead generation in mortgage lending was also minimally discussed, but generally held up as a model for other industries. At this point, it appears that lead generation in mortgage lending may avoid further scrutiny due to the fact that it is already regulated by the states and the federal government.

The panel discussions, guided by the FTC moderators' questions, indicated that the areas of most concern to the FTC are: (1) consumer information being sold downstream without consumer knowledge; (2) privacy and data security concerns regarding the collection, use, and sale of sensitive data; (3) in the online lending industry, the use of remnant leads for continuous selling among lenders or even for fraud; and (4) in the for-profit education market, the use of job boards to collect leads for for-profit institutions.

We anticipate that these areas of interest indicate where the FTC will take its first steps in regulating the previously unregulated landscape of lead generation.

I. Consumer information sold downstream without consumer knowledge

The area of largest concern to the FTC is the continued downstream sale and use of leads. It was emphasized that consumers are often not aware that, after entering their information, the information is generally auctioned to potential users several times, passing through many hands. As a result of the continued sale of consumer information to buyers unknown to the consumer, consumers may be contacted by lenders or industries other than those to which they originally submitted information.

Many questions were posed to panelists regarding consumer's understanding of the downstream sale and trade of information without consumer knowledge. Generally, panelists stated that consumers did not (and could not) know or understand that their information was being sold and further used by lead generators. When asked how lead generators could mitigate the harms of this practice, panelists responded that increased transparency and disclosures could potentially help consumers' understanding. Based on the conversation, it appears likely that the FTC will address this issue by providing guidance to lead generators, possibly requiring the use of certain disclosures by lead generators, or making the sale of consumer information more transparent and accessible to the consumer.

Additionally, the FTC appears to be determining how to apply Section 5 of the FTC Act, which prohibits unfair and deceptive acts or practices, to the downstream sale of information. FTC moderators asked panelists to consider whether it was deceptive to collect consumer information without disclosing how it may be used and sold, and whether misrepresentations are made to consumers in the collection of information used for leads. Panelists considered that the sale could be deceptive, in that it was done without consumer knowledge, and often resulted in consumers being contacted by numerous parties. Moving forward, it is likely that the FTC will attempt to investigate and bring enforcement actions against lead generators for unfair and deceptive practices for the failure to disclose this information to consumers.

II. Collection and use of sensitive data

The FTC was concerned about the collection of sensitive consumer information, including personally identifiable information such as bank account information and social security numbers. Lenders often collect this information on the front end, for example in a lead, to expedite the underwriting process. They can then "augment" or "supplement" the sensitive information with other purchased information to create a full profile of the consumer. However, moderators and panelists considered the collection and storage of this information as putting consumers at risk. There is often no protective process to screen sensitive consumer information as it is bought and sold, an issue that concerned panelists. For example, the FTC and consumer advocates cited to several enforcement actions in which sensitive information was used to fraudulently access consumer bank accounts.

Of particular importance to lenders, panelists pointed out that the type and method of data collection posed fair lending concerns. Unlike lenders, who are bound by the Equal Credit Opportunity Act, lead generators are not necessarily legally bound from collecting sensitive information that can be used to make improper decisions based on protected status. For example, this could result in lead generators selling leads indicating a certain protected status to lenders desiring specific types of borrowers. Panelists expressed that extending the application of fair lending laws to lead generators could mitigate potential fair lending concerns.

Moving forward, it is likely that the FTC will consider putting procedural barriers in place to protect sensitive information as it is collected and sold. Potential required disclosures would warn consumers as to the possibility of information being augmented and passed between many hands. It is important to note that the FTC has stated it will continue to bring enforcement actions against bad actors defrauding consumers.

III. Use of remnant leads, whether selling or for fraud

The sale of remnant leads, leads that are not bought or are unfunded, is of concern to the FTC because it poses a risk of fraud to the consumer. The FTC expressed concern that less desirable leads, such as remnant leads, are often sold to bad actors such as "phantom debt buyers" or "debt consolidation" firms that engage in fraudulent behavior and attempt to collect nonexistent debts from consumers. The possibility that old or unwanted leads can be bought easily and cheaply, and that these remnant leads often represent the most vulnerable consumers, has caught the FTC's attention.

The manner and storage of these leads is considered to pose further risk to the consumer. For example, a panelist expressed concern that information could be stockpiled over years, and sold cheaply when a company needed cash. The sale of this information after a substantial period of time would open consumers to being contacted long after they provided a lead. The length of time between collection and use, and any intermediary sale, of this information could pose additional confusion to consumers as to why they were being contacted.

Moving forward, we anticipate that the FTC will address the use and storage of this information. First, it is likely that the FTC will provide guidance as to the length and manner of lead storage in order to prevent companies from holding consumer information for a lengthy period of time. Next, it is likely that the FTC will place limits on the companies to which these leads can be sold. Last, similar to the issue of consumer information being sold without consumer knowledge, it is likely that the FTC will eventually find unfair and deceptive practices in the continued sale of leads, as consumers are unaware of their continued use or sale long after the information was

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IV. Use of job boards to collect leads for for-profit institutions

While the panelists expressed concern over the methods used by lead generators in several industries, panelists were most troubled by the methods used by lead generators gathering leads for for-profit education institutions. Education is one of the main industries engaging in lead generation and the panelists agreed that lead generation is valuable in that it may introduce students to schools they may otherwise not be exposed to. However, the methods by which some lead generators obtain leads were discussed as being inappropriate.

Of particular concern to the FTC is the use of legitimate job websites, or websites created to appear to be legitimate job websites, which advertise and collect leads from job-searching consumers. These lead generators then sell leads to for-profit institutions who contact consumers. In these cases, the consumers are not aware of how the for-profit institutions obtained their information. Further, there was a concern that the implication of job placement after graduation given by these websites can steer consumers into placement at one of these institutions.

This practice was viewed as potentially unfair and deceptive. Panelists considered it to be potentially a misrepresentation to consumers and, without terms and disclosures, consumers are not aware that their information will be provided to educational institutions. This lack of transparency in the sale of the information is of concern to the FTC. It is likely that, in the future, the FTC will provide guidance against this practice. Additionally, it is likely that the FTC will bring enforcement actions under its Section 5 authority against lead generators engaging in this behavior, calling it unfair and deceptive.

Next Steps

The FTC has opened a comment period for comments and feedback on the content of the workshop. The comment period will remain open until December 20, 2015. The FTC has stated that it will then determine how to move forward, whether through new guidance or additional enforcement actions, and that in the meantime, it will continue to bring enforcement actions against lead generators acting unlawfully.

If you have any questions on this issue, please contact a member of our [Consumer Financial Services Compliance team](#).